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Towards Responsible Governance

A Review of Dr. A. R. B. Amerasinghe's Book on 'Judicial Conduct, Ethics and Responsibilities'

An Independent Public Service Commission

The Right to Inspect Public Documents in Sri Lanka

Supreme Court Judgment on Torture

LAW & SOCIETY TRUST

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Editor's note ...

A scholarly review by ***Justice J. F. A. Soza*** of Dr. A. R. B. Amerasinghe's latest book - 'Judicial Conduct, Ethics and Responsibilities'- is the opening article of this month's issue of the LST Review. The review provides a general insight in to the book which according to the reviewer "... is a truly monumental work, which will rank as a classic on the subject." The first part of the book contains a critical analysis of the different dimensions of judicial conduct, ethics and responsibilities. The discussion is enlivened by the 'cautionary tales' in the second part where the author illustrates the discussion that preceded by referring to practical examples from the real life experiences of past judges. The third part of the book consists of a collection of appendices, which reproduce some of the important codes of law as they pertain to the functions and responsibilities of judges. Reiterating the significance and utility of Dr. Amerasinghe's latest treatise Justice Soza aptly concludes by stating that "(i)t should be the constant companion of every judge and every member of the public interested in a regime of law and order."

Also included in the Review is an article by ***Mr. M. C. M. Iqbal*** wherein he makes a critical analysis of the state of the public service as is existent in Sri Lanka today. The article, while discussing some of the most evident drawbacks in the public service today, explores the extent to which the provisions under the 17th Amendment to the Constitution seek to overcome these problems through the establishment of a seemingly 'independent' Public Service Commission. The author also highlights some of the hindrances which impact adversely on the smooth and efficient functioning of the public service in Sri Lanka. These, he maintains, have eroded public confidence in the system. It is pointed out that unless and until these concerns are effectively dealt with, the establishment of an independent Public Service Commission that seeks to upgrade the public service in Sri Lanka, would necessarily be fiction rather than fact.

Mr. Shantha Jayawardena's article on ***'The Right to Inspect and Obtain Certified Copies of Public Documents in Sri Lanka'*** is a probing discussion on an issue, which has from time to time formed the topic of much debate. In this article, the author focuses his attention particularly on the issue of the right of the public to inspect public documents and to obtain certified copies thereof. In the light of established judicial decisions and applicable law, the author critically analyses the extent to which a right is vested in the public to inspect public documents and to obtain certified copies of them in Sri Lanka. Consequent to a thought provoking discussion on the existing law on this issue both in Sri Lanka and in India, the author convincingly argues that, separate legislation that guarantees the public access to

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public documents is a *sine qua non* of government that ensures transparency and accountability.

Moving from the ideal to a more realistic level, the Review concludes with the reproduction of a recent Fundamental Rights judgment of the Supreme Court of Sri Lanka, the facts of which involved the unlawful arrest, detention and subsequent torture of a 27-year-old woman. The judgment is significant as it marks a vital step forward on the part of the Sri Lankan judiciary in imposing responsibility on the State and its officials for violating the fundamental rights of innocent civilians by acting under colour of office. It is also noteworthy for the unprecedented amount of compensation granted to the victim. The judgment also serves as an 'eye opener' for the reader in that, it highlights modern reality that, despite all the laws and mechanisms that are put in place by the law makers to ensure governance under the rule of law, unless and until a conscientious effort is made by the individual members of society, respect for fundamental rights will essentially be the exception rather than the rule.

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A Review of Dr. A. R. B. Amerasinghe's Book on 'Judicial Conduct, Ethics and Responsibilities'*

*Justice J. F. A. Soza***

Dr. A. R. B. Amerasinghe's latest treatise on "Judicial Conduct Ethics and Responsibilities" is a truly monumental work, which will rank as a classic on the subject. It is remarkable as well for the erudite scholarship that pervades its pages as for the wealth and amplitude of its illustrative material. It is an outstanding pioneering research study wherein the author makes an illuminating survey of the paradigms of judicial ethics culled from a vast array of source material.

The book is arranged in three parts. Part 1 has six chapters carrying a critical evaluation of the various facets of judicial conduct, ethics and responsibilities. Part 2 is rightly headed "Cautionary Tales" and chronicles the sad stories of the indiscretions and delinquencies of judges. These portraits serve as a red alert to the judges of today and the judges of the future. Part 3 is a collection of appendices reproducing relevant provisions of our Constitution, the basic principles of the U.N. on the independence of the judiciary and judicial codes prepared by men of eminence and distinguished institutions in law regimes worldwide.

The first chapter of Part 1 deals with the vocation of a judge. The analysis ranges over a broad spectrum. Judges have been compared to priests and courts to temples. The comparison may not be altogether happy but there is no denying that when a judge enters judicial office he enters upon a sacred calling and takes upon himself a sacred trusteeship. On assumption of judicial office a judge should change his lifestyle. He must remember he has a pivotal role to play in the service of the community. He belongs to an "elite of service". He is accountable to his judicial conscience. But he must also be alive to the mores of the day and focus on the value needs of a society plagued at present by institutional decadence and a cult of violence. In his conduct he must adopt a low profile and avoid excessively conspicuous conduct. But this does not mean that he must go into monastic isolation. The chapter pitches its standards at a very high level and what is stated is buttressed by wide ranging references assembled by a selective exercise characterised by good judgement and sagacious discernment.

Chapter 2 is devoted to the subject of public confidence. The concepts underlying this aspect of the judicial function are well reasoned out. It is the right of every citizen to be tried by judges who are impartial, independent and committed to preserve the integrity of the judicial

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process. The judiciary has no army or police force to carry out its mandates or compel obedience to its decrees. It has no control over the purse strings of government. The strength of the judiciary stems from public confidence. Eternal vigilance is the price the judges have to pay to prevent erosion of public confidence in the judicial process. Judges no longer live in ivory towers insulated from the attentions of their fellow men. The fierce glare of publicity is focussed on the judges. Only the highest standards of judicial conduct and a lifestyle beyond the slightest reproach – like Caesar's wife beyond suspicion, will earn for the judge the confidence of the public. By and large the judiciary has won public confidence but blemishes keep occurring with disconcerting regularity. No doubt when a judge accepts judicial office he does not abdicate humanity. The great tides and currents that engulf the rest of society do not turn aside in their course and pass the judges by. There is however no room for complacency. The judge and even his family members must take every precaution to see that they do not get involved in the political cross-currents of the day and misdemeanours that may impinge on the judge's reputation. However judges must not be insensitive to the feel of the nation's pulse as day in and day out problems of the public of all hues and colours keep pouring into the courts, clamouring for justice and for the enforcement of the rule of law as against the rule of arbitrariness and force. This is the message of this chapter, which is enlivened by apt quotations and enriched by new perspectives and noble perceptions.

Chapter 3 is on the subject of "Justice According to Law." Here again the author takes his inquiry over a vast range of sources. The parameters of liberal judicial interpretation are discussed with admirable lucidity and legal acumen. Value judgments in which extra legal considerations may loom large are the need of the hour in the field of constitutional adjudication. A judiciary that is independent of the electorate and its representatives necessarily needs to preserve the democratic values of society. A judge's personal views on social or political philosophies have no relevance. His interpretations must be in terms of the law. Judicial integrity is consonant with judicial activism and a progressive and even reformist interpretation of the relevant law, if founded on sound reasoning. In the lower courts the law must be ascertained in strict accordance with the statutes, principles of applicable law and decisions of courts higher in the curial hierarchy. In the appellate court at the apex of the judicial hierarchy, the judicial method allows for the development of legal principles subject to the limitation that the Rubicon separating the judiciary from the legislature must not be crossed.

Chapter 4 is on the "Freedom of Speech and the Judge." Here again the author urges the desirability of restraint in judicial pronouncements. Justice is not a cloistered virtue and the right to public scrutiny is an essential part of the judicial system. Restraint in language is the hallmark of a good judge. In the contemporary legal scene the landmark judgments on freedom of speech handed down by Dr. Amerasinghe when he was in the Supreme Court, apart from adding lustre to our legal literature and refining our concepts of the freedom of speech stand as a bastion against invasion from any quarter. Yet the judge must remember that the freedoms granted by the constitutional safeguards protecting freedom of speech are

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no licence for unbridled and unbecoming language. The litigant on the receiving end is helpless and harsh judicial pronouncements will remain a lasting stigma on his reputation. On the other hand judges themselves are helpless when they become targets of unfair and sometimes even abusive criticism. Here recourse to contempt proceedings may be tempting, but this is a dangerous weapon in the armoury of remedies open to the judge. Judicial power is great but full of pitfalls and dangers and should be sparingly used – always in the interests of the administration of justice and never to bolster the judge's own arrogant sense of self-importance. Shakespeare's admonition is cited by the author and is well worth remembering–

> *"O! it is excellent*
> *To have a giant's strength, but it is tyrannous*
> *To use it like a giant."*

Chapter 5 carries an extensive discussion on "Bias or Prejudice." It is fundamental that in the exercise of the judicial function there is no room for bias or prejudice. The fact that this chapter alone has as many as one thousand one hundred and eighty seven references is testimony to the prodigious industry that has gone into the compilation of this chapter. There are anecdotes and examples some of which are grim tales of judicial aberrations and even some shocking instances of depraved and immoral judicial behaviour. These serve as lessons particularly to sitting judges. The cautions given cover a multitude of situations when the judge should disqualify himself from hearing a case. It need hardly be emphasised that he cannot be judge in his own cause. The judge must not only be impartial but he must also appear to be so. Controversial perceptions of different judges on the question of bias are subjected to careful analysis by the author. The reasoning as is to be expected is impeccable and cogent and the principles that should be applied are formulated with meticulous care and precision. There are innumerable illustrations, which pinpoint the precepts that the judge should adopt and follow. The appearance of possible bias survives as a test of disqualification to hear a case. Yet the law must strike a proper balance between protecting confidence in impartial decision-making and discouraging fanciful and unmeritorious allegations of bias. But this is not to be achieved by disregarding the hallowed principle that justice must be seen to be done. The various nuances in the tests to be applied are discussed with admirable clarity. Justice must be administered without fear or favour, affection or ill will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eye to all considerations extraneous to the particular case. The chapter ends with a list of tentative general guidelines.

The last chapter in part 1 deals with the subject of a "Fair Trial." In Sri Lanka a fair trial must be understood as meaning a fair trial within the adversarial system. The right of the defence to be heard (*audi alteram partem)* has been recognised down the ages as a basic principle of a fair trial. The discussion in this chapter marshals a whole list of concomitant

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principles, which have a bearing on the neutrality, and impartiality of the process of adjudication. A dictum of Socrates of ancient vintage spelling out briefly the attributes, which should characterise the judicial function, is among the age – old principles to which the author refers. Socrates said: "Four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially." The very appearance of pre-judgment by reason of contact with parties, lawyers, witnesses or victims must be shunned. There must be transparency, decorum and dignity when the court conducts its proceedings. There is nothing more detestable than coarse behaviour on the part of the judge. Courtesy and patience on the part of the judge are necessary for a fair trial. Discourtesy towards litigants is particularly reprehensible. The Judge must be attentive and patient and give counsel a fair opportunity to present his case. He must not unnecessarily interrupt counsel. An over-speaking judge is no well-tuned cymbal. A wagging tongue and a swollen head are said to be occupational diseases to which judges are prone. It is only in an atmosphere of calm detachment where the Judge does not forsake his role that a fair trial could be held. Interesting incidents enliven the narrative in this chapter and illustrate the requirements of a fair trial.

I will now turn to Part 2 where the author uses short descriptions of the lives of judges of the past to illustrate what he has been saying in part one. These cautionary tales as the author aptly calls them, are meant also to serve as object lessons on what should be avoided in judicial conduct. These vignettes collected from the lives of past judges serve to highlight conduct that can cause miscarriages of justice by obsequious servility to the government and by improper affiliations with vice dens. The author points out that using public funds or public property for private purposes and trying cases in which the judge has a pecuniary or other interest, can pervert justice and amount to moral turpitude. These portraits also show the scandal that can be created by the judge leading a Jekyll and Hyde life and by indulging in activities that give rise to speculative gossip. These sketches also underline the dangers of indiscreet public utterances on controversial political issues.

Part 3 is in nine appendices. Appendix 1 sets out relevant provisions of our Constitution while appendix 2 reproduces the U.N. basic principles of the independence of the judiciary. There are then the codes of conduct prepared by various institutions and distinguished judges. Appendix 6 reproduces the Bangalore draft on judicial conduct. The draft is yet to be perfected and the present volume prepared by Dr. Amerasinghe is to be used to assist in finalising the principles set out in the Bangalore draft. For us in Sri Lanka, perhaps the code (appendix 8) prepared by the late Justice D. Wimalaratne contains an acceptable summary of precepts, which judges should follow. Particularly impressive are the statements in clause 41 and the summary in clause 42. Clause 41 states the proceedings of courts should be conducted with fitting dignity and decorum so as to reflect the importance and seriousness of the inquiry to ascertain the truth. By way of summing up this code states in clause 42, "In every particular the conduct of a judge should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of

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public clamour, regardless of public praise, and indifferent to private, political or partisan influences; he should administer justice according to law, and deal with his appointment as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity." The author appropriately concludes the list of these appendices with an extract from Cardinal Newman's Discourse on the "Idea of a University" on who is a gentleman. A judge who is a gentleman is what everyone wants.

Dr. A. R. B. Amerasinghe's book will stand for generations to come as a work of encyclopaedic compass to guide and educate judges and other officials involved in the administration of justice and even the community at large. It is a unique contribution to our legal literature and of its kind there are no parallels anywhere in the world. It should be the constant companion of every judge and every member of the public interested in a regime of law and order. It is indeed a masterpiece of an outstanding intellectual of our times.

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An Independent Public Service Commission for a better Public Service - Fact or Fiction?

M. C. M. Iqbal[*]

According to a World Bank Report Sri Lanka is burdened with one of the largest public services in Asia with over 700,000 persons in service, which means there are 3.1 public officers to every 100 citizens.[1] Speaking at the inaugural meeting of the Steering Committee of the Distance Education for Public Servants Scheme of the Ministry of Public Administration, Mr. Bradman Weerakoon, Secretary to the Prime Minister is reported to have said that a smaller public service would provide a better service.[2] Therefore, the reforms proposed recently by various writers to journals and newspaper are of critical importance. The attempt made at such reform which followed the Report of the Administrative Reform Committee headed by Mr. Shelton Wanasinghe as far back as in the early 1980s also recommended a 'lean public service with a fat salary'. Consequently Public Administration Circular No. 44 of 1990 was issued, which enabled early retirement of public officers in a bid to reduce their numbers. This resulted in a large number of capable and competent public officers retiring from the public sector and joining the private sector, leading to further deterioration of the public service. It is, therefore, hoped that on the next attempt to rid the service of redundant staff, a properly devised voluntary retirement scheme would be implemented followed by a better wage structure. It is equally important to provide necessary resources to those remaining in service in order to motivate them to perform better. One common factor to which most of the articles published made reference to, is the canker of political interference that has eaten into the once efficient public service and reduced it to a abysmal state.

Mr. Charitha Ratwatte, Secretary, Ministry of Finance is reported to have stated that the government intends to establish an independent Public Service Commission with the intention of improving the performance of the public service.[3]

The expectations of the public are that the establishment of the 'independent' Public Service Commission under the 17th Amendment to the Constitution, would restore the public service of the country to what it was at its pristine glory in the pre and also early post independence era. However, closer scrutiny of the provisions relating to the public service in the 17th Amendment reveals several anomalies which could stand in the way of fulfilling this expectation.

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[1] *Vide* Daily News of 5th August 2002 at page 1.

[2] *Ibid.*

[3] *Ibid.* p 14.

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Article 55(1) of the 17th Amendment to the Constitution reads:

> *"The appointment, promotion, transfer, disciplinary control and dismissal of public officers shall be vested in the Commission."*

While on the face of this provision it would appear that the expectation of an 'independent' Public Service Commission has become a reality, Article 55(3) seems to retain with the Cabinet of Ministers their power of control over heads of departments.

> *Notwithstanding the provisions of paragraph 1 of this Article, the appointment, promotion, transfer, disciplinary control and dismissal of all Heads of Departments shall vest in the Cabinet of Ministers, who shall exercise such powers after ascertaining the views of the Commission.*

This provision gives the impression that what was given with the right hand has been taken away with the left hand. What purpose would be served by an independent Public Service Commission, if it cannot exercise control over Heads of Departments and protect them from political maneuvers? In other words, it would seem that despite the provisions of Article 55(1), the public service would continue to be the pawn of politicians who could manipulate it through the heads of departments. If the words *"with the concurrence of the Commission"* had been used in Article 55(3) instead of *"after ascertaining the views of the Commission,"* the effect would have been significantly different. It is therefore anybody's guess whether political interference would in fact cease with the establishment of an independent Public Service Commission.

The Provincial Councils Act No.42 of 1987 took away a large slice of the administration of the public service from the hands of the central government and placed it in the hands of provincial councils. Rather than making provision for an independent Public Service Commission, Article 55(2) of the 17th Amendment retains this position in keeping with the devolution of powers under the 13th Amendment to the Constitution. It should be noted that the Provincial Public Service Commission is an arm of the Provincial Governor who in turn will invariably be a partisan individual, being a representative of the President in the Province.

However, the true implications of the 17th Amendment are yet to be seen and only time will decide whether the objective of establishing an independent Public Service Commission has been achieved or not. If there is a political will to do so, then resolving any discrepancies in the law would not be a major force to reckon with. It is important to note at this point that, public sector reform through institutional strengthening and good governance is one of the terms in the agreement between Sri Lanka and the International Monetary Fund. Civil society institutions also have a role to play in this regard and therefore should be afforded an

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active involvement in the reforming of the public service and in bringing instances of malpractice to the attention of those concerned - particularly, the judiciary.

If the public service in Sri Lanka is to serve the purpose for which it was created, a more sincere and greater effort has to be made to rescue it from its present state. As was pointed out earlier, one of the principal reasons for the present state of the public service is the incessant political interference. Besides this, the lack of proper training, dedication, attitudinal orientation, and the absence of adequate motivation are also contributory factors. In this context, the inauguration of a comprehensive orientation programme for public officers under the Distance Education for Public Servants Scheme of the Ministry of Public Administration and Administrative Reform, is a welcome move.

Promotions in the public service need to be linked to performance in the various posts held in the service and not just to seniority. A flawless performance evaluation system has to be evolved by the proposed Public Service Commission. Recommendations from politicians should carry no weight at all either for promotions or for transfers. Instances of misconduct should be dealt with swiftly and effectively by initiating prompt disciplinary proceedings. Politicians should be debarred from interfering in disciplinary proceedings.

A record of the skills and noteworthy performances of members of the public service, be it as administrators, disaster managers, engineers, medical personnel, surveyors, accountants, or even as clerks or employees of other grades, must be maintained and duly consulted. The recognition of merit in the performance of one's duties could motivate persons to excel in their respective fields.

Together with these changes, it is also necessary that the salaries of public officers be made more attractive. They should be adequately protected from the effects of inflation. Often the lower echelons of the public service are prone to indulge in corrupt practices to make ends meet whilst those at the top indulge in it as an easy means of self-aggrandizement. The wage scheme needs to be made attractive enough to draw in high quality personnel.

The possibility of extending the age of retirement to enable the services of capable public officers to be availed of by the State should be considered. This needs special consideration in view of the increase in the ageing population in Sri Lanka.

The introduction of voluntary retirement schemes, reforming of pension schemes and ensuring equal treatment to employees of the same 'level' in both the private and public sectors should be considered as necessary components in the overall reform of the public service.

The duplication of government institutions under the control of the Central Government, in the Provinces consequent to the 13th Amendment to the Constitution, is another issue that

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needs to be addressed. What the 13th Amendment sought to do was to devolve and not to duplicate. Hence, there is an urgent need to rationalise and to cease the operation of many such institutions pertaining to devolved subjects. The proliferation of ministerial posts has also led to a series of negative effects such as splintering of sectoral responsibilities and development concerns, not to mention the huge drain on resources.

In these circumstances, it is fictitious to believe that the public service will perform better after the establishment of the new Public Service Commission. The appointment of suitable individuals to the public service possessing the required knowledge and expertise to carry out this process is a *sin qua non* in achieving this objectives has been exemplified by past experience. Certain steps should necessarily be taken to improve the public service to in order to ensure good governance in the country. Whether and to what extent these reforms would be implemented remains to be seen.

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The Right to Inspect and to Obtain Certified Copies of Public Documents in Sri Lanka

Shantha Jayawardena[*]

1. Introduction

Democratic governance requires transparency and accountability on the part of public authorities. Access to information held by public authorities, is necessary to ensure the informed participation of the citizen in the democratic process.

In Sri Lanka there is neither a constitutionally recognised right to information[1] nor a separate law[2] that ensures access to government held information.[3] Against this backdrop, the law relating to the right to inspect and to obtain certified copies of public documents requires in depth discussion.

This paper briefly outlines the current law of Sri Lanka relating to public documents. It also attempts to suggest possible reforms so as to ensure transparency and accountability on the part of the public authorities and also the right of the citizen to have access to government held information. However, the paper does not deal with the evidential aspects of public documents, such as admissibility and proof of the contents thereof.

2. Public Documents

Section 74 of the Evidence Ordinance[4] specifically identifies the categories of public documents. The section reads:

> ***74. The following documents are public documents: -***
>
> ***(a) documents forming the acts, or records of the acts-***
>
> *(i) of the Sovereign authority;*

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[1] However, the Supreme Court of Sri Lanka has in certain instances where the freedom of thought is infringed by the denial of information, interpreted Article 10 of the 1978 Constitution of Sri Lanka to include the freedom of information. See ***Gamini Athukorala v. The Attorney General***, SC Special Determination No.1/97 – 15/97 and ***Wimal Fernando v. Sri Lanka Broadcasting Corporation***, [1996] 1 Sri LR 157.

[2] In November 1996, the Law Commission of Sri Lanka, released a draft bill titled "Access to Official Information Act".

[3] For a detailed discussion on the right to information in Sri Lanka and the draft of the Law Commission, see: "The Right to Information in Sri Lanka"- Dr. Deepika Udagama, *Sri Lanka: State of Human Rights 1999*, Law & Society Trust, Colombo, 1999.

[4] No 14 of 1895, Cap 14 of the Legislative Enactments of Sri Lanka, 1980. Hereinafter referred to as the Ordinance.

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(ii) of the official bodies and tribunals; and

(iii) of the public officers, legislative, judicial and executive, whether of Ceylon or of any other part of Her Majesty's Realms and Territories, or of a foreign country;

(b) public record, kept in Ceylon, of private documents;

(c) plans, surveys, or maps purporting to be signed by the Surveyor – General or officer acting on his behalf.

By virtue of Section 75 of the Ordinance, the categories specified in Section 74 are rendered exhaustive. Section 75 provides:

All other documents are private.

As a consequence, unless a particular document falls within one of the categories specified in Section 74, it is a private document. However, it is important to note that according to the long title, the Evidence Ordinance consolidates, defines and amends the law relating to evidence.

2.1 Judicial Interpretation of Section 74

A. Sri Lanka

Our courts have held that a Bed-head ticket[5], a register kept by a *vel-vidane* for his own information[6] and a register kept at the registry[7] are not public documents falling within any of the categories specified under Section 74 of the Ordinance, for the reason that they are not recorded under a statute.

B. India

There are a large number of Indian cases dealing with Section 74 of the Indian Evidence Act, which is identical to the Evidence Ordinance of Sri Lanka. Significantly, Indian Courts have held that documents such as plaints, written statements, affidavits and petitions that are filed in courts are not public documents for the reason that, they are not acts or records of the acts of a public tribunal or officer but the acts or records of private parties.[8]

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[5] ***Gunasekere v. Gunasekere*** 41 NLR 351
[6] ***Pedrick Appuhamy v. Ekman Singho*** 38 NLR 165
[7] ***Chelliah v. Saira Paripalam*** 47 NLR 417
[8] ***Manbodh v. Hirasal***, 1926 Nag.339:93 I.C.650, ***Tarkeshwar Prasad Tewari v. Debendra Prasad Tewari*** 1926 Pat.180:92 I.C.184.

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3. Right to Obtain Certified Copies of Public Documents

Section 76 of the Ordinance provides:

> *Every public officer having the custody of a public document, which any person has* ***a right to inspect****, shall give that person* ***on demand*** *a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies.*[9]

Accordingly, to obtain a certified copy of a "public document" there are three requisites that need to be satisfied. Namely,

- It should be a document in respect of which there is a right to inspect;
- A demand for a copy should be made by the person concerned;
- The required legal fees should be paid.

In ***The Attorney General*** v. ***Geeting Singho,*** De Silva J observed:

> *This section* [Section 76] *makes it clear that a person is not entitled to obtain as a matter of right a certified copy of every public document. He is entitled thereunder to obtain certified copies of only those public documents, which he has a right to inspect.*[10]

Thus, the right to obtain a certified copy of a public document depends upon the question whether that person has a right to inspect that particular document. This in turn raises another question as to where the right to inspect a public document stems from.

4. The Right to Inspect

Although Section 76 of the Ordinance speaks of a right to inspect public documents, the Ordinance does not contain any provision which confers a right to inspect.

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[9] Emphasis added.
[10] 57 NLR 289, at p.293

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In the case of ***Buddhadasa*** v. ***Mahendiran***[11] it was held by the Supreme Court that, the documents which a person " has a right to inspect" within the meaning of section 76 of the Evidence Ordinance are only those in respect of which the right of inspection is expressly conferred by enactment. H.N.G. Fernando, J., stated:

> *In my opinion, however, the documents, which a person "has a right to inspect." are only those in respect of which the right of inspection is expressly conferred by enactment.*[12]

In the Indian case of ***Emperor*** v. ***Swamiyar***[13] it has been held that the question whether any person has a right to inspect a public document on the ground of interest is one that has not been dealt with in the Indian Evidence Act and is altogether outside its scope.[14]

Therefore unless and until a right to inspect is conferred by law, a person is not entitled as of right to obtain a certified copy of a public document. In other words, there may be public documents in respect of which the public has no right to obtain a certified copy.

However, in the absence of a statutory provision conferring a right to inspect a public document, our courts have in some instances brought in English Law under section 100 of the Ordinance to confer such a right.[15]

5. Application of the English Law in Sri Lanka

As the Ordinance does not contain any provision which confers a right to inspect public documents, our courts have in some cases, brought in the English Law under Section 100 of the Ordinance, in order to decide whether there exists a right of inspection in respect of a particular document.

For instance in the case of ***Attorney-General*** v. ***Geeting Singho***[16] the issue was whether an accused in a criminal case is entitled to obtain a certified copy of the first complaint recorded against him by the police, under the provisions of Section 121(1) of the Criminal Procedure Code. The Supreme Court having accepted that it was a public document within the meaning of Section 74 (a)(iii) of the Evidence Ordinance, went on to state however that there is no provision in the Criminal Procedure Code which confers a right on the defence to obtain a

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[11] 58 NLR 08.
[12] *Ibid* at p. 15
[13] (1907) ILR 30 Madras 466 referred to in ***Buddhadasa v. Mahendiran***.
[14] Provisions in section 76 of the Indian Evidence Act (1872) are identical to the provisions in the corresponding section 76 of the Ordinance.
[15] See discussion *infra*.
[16] *Supra* n 10.

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certified copy of the first complaint. In these circumstances, the Supreme Court was of the opinion that:

> *"In the matter of right of inspection the English Law, however, is of considerable assistance."*[17]

The court quoted the following observation of Lindley J. in the English case of ***Mutter*** v. ***Eastern and Midlands Railway Company***.[18]

> *"When the right to inspect and to take is expressly conferred by a statute the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred the extent of such right depends on the interest which the applicant has in what he wants to copy and what is reasonably necessary for his protection of such interest. The common law right to inspect and take copies of such public documents is limited by this principle."*

Applying the principle in the ***Mutter*** case the Supreme Court held that, the first complaint is vitally necessary for the preparation of the defence and that therefore the accused is entitled to obtain a certified copy of the first compliant in terms of Sections 74 and 76 of the Evidence Ordinance. However, the court did not specifically refer to Section 100 of the Ordinance to justify its resort to the English Law.

In the later case of ***Buddhadasa*** v. ***Mahendiran***[19] it was held by the Supreme Court that, the issue whether a person has a right to inspect a public document **does not raise a question of evidence** within the meaning of Section 100 of the Evidence Ordinance and therefore the English Law relating to inspection of public documents cannot be brought in under Section 100 of the Evidence Ordinance. The Court's position was that under Section 100 of the Ordinance, English Law can be resorted to only with regard to a question of evidence.

Section 100 of the Ordinance provides:

> *Whenever in a judicial proceeding* ***a question of evidence*** *arises not provided for by this Ordinance or by any other law in force in Ceylon, such question shall be determined in accordance with the English Law of Evidence for the time being.*[20]

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[17] Per De Silva J. at p.294
[18] (1888) 38 Chancery Division 92.
[19] *Supra* n 11.
[20] Emphasis added.

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Section 100 of the Ordinance should also be looked at in the context of the existence of other statutory provisions which specifically confer the right of inspection.[21]

In ***Buddhadasa*** v. ***Mahendran*** H.N.G. Fernando, J., stated:

> *Having regard to the existence of numerous enactments in which the Legislature has chosen with deliberation to confer such a right, it would be unreasonable to suppose that the Legislature intended by section 76 to add to the list of instances in which such a right could be claimed. If the expression "right to inspect", occurring in section 76, had had no meaning in our law owing to the lack of statutory provision there might well have been scope for the admission of English Law under section 100 to fill the place of casus omissus. But the existence of ample statutory provision conferring the right to inspect public documents contradicts the view that there is here any question of casus omissus.*[22]

Accordingly, the English Law relating to the right of inspection cannot be brought in under Section 100 of the Ordinance. Therefore unless the right of inspection is conferred by enactment, there is no right for the public to inspect public documents.

6. Conclusion

The Evidence Ordinance was enacted in 1895 and since then the nature and functions of public authorities as well as public documents have undergone dramatic changes. There are various documents that are public in nature which affect the rights of the people that may not fall within the meaning of Section 74 of the Ordinance. For instance, the Environmental Impact Assessment (EIA) Report,[23] may not fall within the meaning of Section 74 of the Ordinance, since it is prepared by a private agency.

The right of inspection has been conferred by enactment only in a limited number of instances. Therefore even in respect of documents that fall within the meaning of Section 74, the public may not have any access.

Furthermore, the developments in the English Law with regard to the right to inspect and to obtain certified copies of public documents cannot be incorporated in to our law under

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[21] See for example: Section 56(1) of the Births and Deaths Registration Act, No 17 of 1951 and Section 23BB(2) of the National Environmental (Amendment) Act, No.56 of 1988.

[22] *Supra* n 11 at p. 15

[23] An EIA Report is prepared by the Project Proponent under section 23 BB (10) of the National Environmental (Amendment) Act No.56 of 1988, setting out the economic, sociological and environmental implications of the project and the alternatives to the project that were considered along with the reasons for their rejection.

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Section 100 of the Ordinance, as it has been held that they are not questions of evidence within the meaning of Section 100.

The Evidence Ordinance is to consolidate, define and amend **the law of evidence**. Its provisions on public documents are designed to address the evidential issues pertaining to public documents. Therefore, if access to public documents is considered as a measure of ensuring transparency and accountability on the part of the government, a separate law in this regard is of vital necessity.

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IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under Article 126 of the Constitution of the Democratic Socialist Republic of
Sri Lanka.

Yogalingam Vijitha Paruthiyadaippu,
Kayts.
Presently in Remand at
Remand Prisons, Negombo

Petitioner

S.C. Application
FR No. No. 186/2001

v.

1. Mr. Wijesekara
Reserve Sup. Inspector of Police,
Police Station,
Negombo.

2. Head Quarters Inspector
Police Station,
Negombo

3. Mr. Saman Karunaratne
Sub Inspector of Police
Terrorist Investigation Division
101, Chaitiya Road,
Colombo 01.

4. Mr. H.G. Wickremasinghe, SSP
Director,
Terrorist Investigation Division
101, Chaitiya Road,
Colombo 01.

5. Inspector General of Police,
Police Head Quarters, Colombo 01.

6. The Superintendent of Police,
Remand Prisons,
Negombo.

7. Hon. Attorney General,
Colombo 12.

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8. Thurairatnam Maheswaran,
Alias Babu
Rita Road,
Negombo

9. Solanga Arachige Mudith Nishantha
Inspector of Police,
Police Station, Negombo.

Respondents

BEFORE : Fernando, J.
Gunasekera, J.
Ismail, J.

COUNSEL : V.S. Ganeshalingam with v. Yogeswaran For Petitioner

Saliya Peiris With Upul Kumarapperuma for
1st, 2nd, & 9th Respondents

M. Wijesundera S.C. for
4th, 5th, 6th & 7th Respondents

T.J. Zeinudeen for 3rd Respondents

ARGUED ON : 24.8.2001

DECIDED ON : 23.8.2002

GUNASEKERA, J.

The Petitioner seeks relief from this Court for the alleged infringement of her Fundamental Rights secured by Articles 11, 13(1) and 13 (2) of the Constitution.

The facts relating to this application are as follows:

The petitioner is a 27 year old woman from Kayts whose family had got displaced in 1990 and was living in Jaffna. Since she got displaced again in 1995 due to military operations in Jaffna she had moved into Kilinochchi. The petitioner's mother had gone abroad for employment in 1989 whereupon the petitioner's father had deserted the family. Whilst at Kilinochchi the petitioner had worked as a volunteer primary teacher at the Sivapathakalaiyakam Government School for a short period. When she was in Kilinochchi

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one of her aunts had arranged a marriage for her and had requested her to come to Negombo. Then she had come to Negombo on 23.01.2000and had been staying with her aunt at No. 47, Sylvester Road, Negombo. On 9.2.2000 as arranged by her aunt the marriage was registered at Vavuniya between her and one Thurairatnam Maheswaran alias Babu who is named as 8th respondent in this application. She had continued to stay with her aunt in Negombo. Subsequently she had learnt that her husband was a married man with two children and therefore she had refused to go through the customary Hindu marriage and to live with him as husband and wife. The 8th respondent on hearing her refusal to live with him as husband and wife had started to harass her and had threatened her to go through with the customary marriage ceremony. Out of fear that the 8th respondent might harm her, she had left Negombo for Trincomalee on or about 7.4.2000 and had taken refuge at her sister's house at 46/2, Linganagar, Trincomalee. Whilst at Trincomalee the 8th respondent had given her several telephone calls and threatened her that unless she returns to Negombo and lives with him that he would use his influence with the Negombo Police and have her arrested as a member of the LTTE suicide squad and have her tortured.

On 21.6.2000 when she was at the People's Bank, Trincomalee at about 11 a.m. a person called Sekar whom she had known as a friend of the 8th respondent had come to the Bank and had requested her to come out. As she came out of the Bank a group of policemen in civilian clothes headed by Wijesekara, the 1st respondent, Reserve Sub Inspector had arrested her and hand – cuffed her and put her into a private Elf van that was parked there. Inside the van one of the occupant's had told her that they had come from the Negombo Police Station to arrest her in connection with some information given against her by the 8th respondent. Inside the van she had found her brother also hand-cuffed. The van had been driven to her brother's residence at Trincomalee and the Police Officers had ransacked her brother's house and searched everywhere. Thereafter, the van, along with the petitioner and Sekar and the policemen had been driven to Negombo. They had arrived at Negombo at 6.30. p.m. and she had been put into a garage hand –cuffed and had been kept there till about 10 p.m. Whilst she was inside the garage the police had accused her of being a LTTE suicide bomber and had assaulted her with a club on her knees, chest, abdomen and back, which caused her unbearable pain. After assaulting her she had been put into a cell at the Negombo Police Station and had been detained there till 26.6.2000 on a Detention Order R2, issued by Daya Jayasundera, D.I.G. Western Province, (Northern Range) under Regulation 19 (2) of the Emergency Regulation for 90 days. Whilst in detention between 21.6.2000 and 26.6.2000 she had been subjected to torture. The petitioner alleges that her ear studs had been removed and slapped with force. Her face had been covered with a shopping bag containing chilli powder mixed in petrol which led her to suffocate. On one occasion she had been asked to remove all her clothes except her underwear and the brassier and her face had been covered with shopping bag containing petrol and chilli powder after which she had experienced a burning sensation all over her body. She had been asked to lie flat on a table and whilst four policemen were holding her, pressed to the table, four other policemen had pricked paper pins under the nails of the fingers and toes. She had been assaulted with a club and wires and

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when she fell down she had been trampled with boots. On another occasion she had been hung and whilst she was hanging had been assaulted with a club all over her body.

On or about 25.6.2000 the policemen who were torturing her had asked her to place her signature on some statements prepared by them and when she refused to sign, one policeman had shown a plantain flower soaked in chilli powder and had said that it would be introduced into her vagina unless she signed the papers. When she refused to sign she had been asked to remove her blouse and cover her eyes with it and had been asked to lie on a table. Whilst she was lying down on the table four policemen had held her hands and held her legs apart and the plantain flower had been inserted by force into her vagina and had been pulled in and out for about 15 minutes. She had experienced tremendous pain and a burning sensation. She had become unconscious and after a few minutes she had been asked to lie on the table till about 9.30 p.m. After some time some sheets of paper typed in Sinhala had been brought by them and she had been asked to place her signature on them. Being unable to bear the torture she had signed them. The contents of the documents she signed had neither been read nor explained to her. After sometimes she had been put into a cell with strict instructions that she should not wash her genital region. When she was crying in pain inside the cell one policeman on duty had shown mercy on her and by about mid night had been permitted to use the toilet. The acts of torture meted out to her as set out above has affected her physically and psychologically and her matrimonial prospects had been shattered as a result of the mental and physical trauma that she had undergone at the hands of the police. She states that she is suffering from depression, loss of sleep, loss of appetite, loss of concentration, fear and nervousness.

On 26.8.2000 a police officer from the Terrorist Investigation Division had visited her at the Negombo Police Station and she had pleaded with him to remove her from the Negombo Police Station and thereupon she had been transferred to the Terrorist Investigation Division, Colombo where she was detained till 20.9.2000. She states that whilst in detention at the Terrorist Investigation Division too that she was mercilessly assaulted by Sub inspector Saman Karunaratne, the 3rd respondent, who had forced her to write in Tamil what was dictated to her which included several admissions that she was a member of the LTTE. Whilst in detention at the Terrorist Investigation Division she had started bleeding and had been taken to the National Hospital on 11 days and treated. On 21.7.2000 she had been produced before the Colombo Magistrate under the Emergency Regulations. In Court when she attempted to inform the Magistrate regarding the acts of torture meted out to her Sergeant Wijeratne of the Terrorist Investigation Division who was beside her had prevented her from complaining to the Magistrate, and she had been taken back to the Terrorist Investigation Division.

On 21.7.2000 she had been taken from the T.I.D. to the Vavuniya 'pass office' by the 3rd respondent and Superintendent of Police Gamini Dissanayake of the T.I.D. and a bundle of applications made by Tamil persons for passes to travel to Colombo had been placed before

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her and she had been asked to identify the members of the LTTE. When she failed to identify any one, she had been mercilessly assaulted by S.I. Karunaratne the 3rd respondent, in the presence of S.P. Dissanayake who advised her to pick some application to avoid getting assaulted further.

On 21.9.2000 she had been produced before the Colombo Magistrate with strict instructions that she should not attempt to speak to the Magistrate and she had been remanded under Section 7 (2) of the Prevention of Terrorism act and had been taken to the Negombo Remand Prison. On 23.10.2000 she had been produced before the Colombo Magistrate and upon an application made by her Attorney at Law the learned Magistrate had ordered the Judicial Medical Officer, Colombo North to examine her and submit a report to Court whereupon she had been admitted to the Ragama Government Hospital and had been warded for three days. At the Ragama Government Hospital she had been examined by an Assistant Judicial Medical Officer, a Consultant psychiatrist, a Consultant Obstetrician and Gynecologist and by a Consultant Radiologist. The report of Dr. Chandrapalan the Assistant Judicial Medical Officer, Teaching Hospital, Colombo North (Ragama) had been produced (marked P2)

The petitioner further states that whilst she was in the remand prison at Negombo that she had come across a Tamil daily News paper of the 18th of January 2001 in which a photograph of some police officers of the Negombo Police Station who had recovered some articles from a group of robbers alleged to be headed by a person in the garb of Buddhist Monk had appeared. She states that in that photograph she identified the policeman who had inserted the plantain flower into her vagina at the Negombo police Station when she was being tortured. A copy of the scanned photograph with the encircled picture of the officer has been marked as 'P1'. When this application was taken up for support in Court learned Counsel appearing for the petitioner had prayed for an Order directing the 2nd Respondent (Head Quarter's Inspector) of the Negombo Police Station to submit to Court the name and address of the police officer whose photograph is encircled in 'P1' and the name and address of the police officers who arrested the petitioner at Trincomalee on 21.6.2000. Accordingly this court had directed the 2nd and 5th respondents viz the H.Q.I. of the Negombo police station and the I.G.P. to submit affidavits to this Court in regard to the identity of the officer who is encircled in the photograph 'P1'.

The H.Q.I. of the Negombo Police Station had forwarded an affidavit dated 17.4.2001 through the Director of the Police Legal Division to this Court in which he has identified the officer who is encircled in the photograph 'P1' as Police Inspector Solanga Aratchchige Mudith Nishantha, who is working under him as an Inspector in the Special Intelligence Detection Branch of the Negombo Police Station. After the receipt of the affidavit of the 2nd respondent identifying the officer whose photograph is encircled in the document produced as 'P1' the learned Counsel for the petitioner had by a motion made an application to obtain an order from the Court to have the said Police Inspector Solanga Aratchchige Mudith Nishantha added as a respondent to this application. On 18.5.2001 the said motion had been

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supported and the Court permitted the petitioner to add the aforesaid Police Inspector S.A.M. Nishantha as the 9th respondent in this application and notice was directed to be issued on him to file his objections.

The notice issued on the 8th Respondent had been returned undelivered with an endorsement "unable to deliver without a number." By a motion dated 4.7.2001 the petitioner had submitted that she is unable to ascertain the address of the 8th respondent and therefore under the circumstances that she does not wish to proceed against the 8th respondent.

Only the 1st, 2nd, 3rd and the 9th respondents have filed their objections. The 1st, 2nd and 9th respondents by way of a preliminary objection have stated that the petitioner's application that was filed on 19th March 2001 is out of time since the petitioner had been visited by an Attorney at Law Mr. C. Ganesharajah on 14th September 2000 when she was detained at the T.I.D. of the Criminal Investigation Department and therefore the application should have been filed within one month of 14th September 2000. The 3rd respondent who has raised the same objection however, has taken up the position that on her own admission in paragraph 24 of the petition and 25 of the affidavit the petitioner has taken up the position that she was represented by an Attorney at Law when she was produced before the Magistrate on 25.10.2000 and the application should have been filed within one month from that day.

In the counter affidavit of the petitioner she has stated that although an Attorney at Law visited her when she was in detention that she could not communicate with him freely or give instructions, for the reason that the officers of the Terrorist Investigation Division had warned her not to complain to him about the treatment meted out to her and that if she does so that she will be further tortured. Further that the communication with the Attorney at Law took place in the presence of four Police Officers, and although an Attorney at Law appeared for her when she was produced in Court on 23.10.2000 a complaint of torture was made by way of an affidavit to the Magistrate who whereupon made a direction to the Judicial medical Officer to examine her. It was submitted by the learned Counsel for the petitioner that the petitioner was under restraint from the date of her arrest and she was able to secure a copy of the medical examination report only on 12.3.2001.

In the case of ***Saman*** v. ***Leeladasa and another 1989 1 Sri LR, 1***. The petitioner had been arrested on 29.7.87 and produced before the Elpitiya Magistrate 18.10.87 and remanded to the Galle Prison, on his orders made from time to time. While in custody on 1.12.87 the petitioner was bathing at a water tank near the prison cell the 1st Respondent was alleged to have assaulted the petitioner saying that he was not entitled to bathe there at that time. Though the application was filed only on 7.1.88 more than one month after the alleged infringement took place on 1.12.87. It was held that "yet being a remand prisoner the petitioner's lack of access to a Lawyer and his hospitalization from 2.12.87 in remand prison till his release on 11.12.87 must be taken into account." It was observed by Fernando, J at page 10 that "the period of time necessary would depend on the circumstances of each case.

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Here, the Petitioner has hospitalized from 2.12.87 until his release, and was thus prevented from taking immediate action to petition this Court for redress: an impediment to the exercise of his fundamental right under (Article 17) to apply to this Court caused by the very infringement complained of. Further, the fact that he had been assaulted, or that an injury had been inflicted on him, would not per se bring him under Article 11: whether the treatment meted out to him would fall under Article 11 would depend on the nature and extent of the injury caused: until the petitioner had knowledge, or could with reasonable diligence have discovered, that an injury sufficient to bring him within Article 11 had resulted, time did not begin to run. The principle lex non cogit ad impossibilia applied and the application was held to have been filed within time.

In the case of ***Namasivayam*** v. ***Gunawardena 1989 1 Sri L.R, 394 at 400*** Sharvanande CJ observed that "to make the remedy under Article 126 meaningful to the applicant the one month prescribed by Article 126(2) should be calculated from the time that he is under no restraint. If this liberal construction is not adopted for petitions under Article 126 (2) the petitioner's right to his constitutional remedy under Article 126 can turn out to be illusory. It could be rendered nugatory or frustrated by continued detention.

Having regard to the circumstances relating to this case I hold that although an Attorney at Law had visited the petitioner on 14.9.2000 when she was detained at the Terrorist Investigation Division and although an Attorney at Law had appeared for her when she was produced in Court on 23.10.2000 that the petitioner was under restraint and that time did not begin to run until the petitioner was able to secure a copy of the Judicial Medical Officer's report on 12.3.2001 and the application filed on 19.3.2001 has been filed within time. For the reasons stated I overrule the preliminary objections raised by the respondents.

The 1st respondent admits that he and a party of police officers from the Negombo Police Station went and arrested the petitioner at Trincomalee on 21.6.2000 and searched the house in which she was residing at Trincomalee and brought her back to the Negombo Police Station at about 9 p.m. He denies that the petitioner was detained in a garage at the Negombo Police Station and tortured by stating that she was a LTTE suicide bomber. He further admits that the petitioner was detained in a police cell and kept there till 26.6.2000 under a detention order issued by Daya Jayasundera, Deputy Inspector General of Police, Western Province, (Northern Range). The 1st respondent vehemently denies that the petitioner was assaulted by him or any other police officer attached to the Negombo Police Station whilst the petitioner was being detained at the said police station. The 1st respondent further states that the petitioner was produced before the Judicial Medical Officer of Colombo on 19.7.2000 and the petitioner did not disclose to him a word about the alleged assault torture and degrading treatment that she faced.

The medical report referred to by the 1st respondent was called from the Judicial Medical Officer, Colombo and the Consultant Judicial Medical Officer, Colombo has forwarded the

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report of Doctor M. Sivasubramaniam Assistant Judicial Medical Officer, Colombo who had examined the petitioner at about 2.30 p.m. on 18.9.2000. An examination of the said report reveals that the petitioner had complained to the Assistant Judicial Medical Officer that she had been arrested by the police at Trincomalee on 21.6.2000 and taken to the Negombo Police Station on the same day and kept there till 26.6.2000 and that during the said period that police had assaulted her with clubs, wires and her head and face had been covered with a shopping bag containing petrol and chilli powder. Further all her clothes, except the brassier had been removed and the tip of a plantain flower rubbed with chilli powder had been introduced to her vagina which had resulted in bleeding.

However according to the report of the A. J.M.O of Colombo he has found no injuries or scars of recent injuries on the petitioner's head, face, chest, abdomen, and of her upper limbs, and lower limbs. The A.J.M.O., states that her external genitalia were not examined as the corpus refused to give her consent for such examination. The A.J.M.O. concludes that there were no injuries or scars of recent injuries and that he cannot give an opinion regarding the history of sexual assault.

It is to be noted that the history given by the petitioner to the A.J.M.O., Colombo when he examined her on 18.9.2000 contradicts the assertion of the 1st respondent contained in paragraph 9 of his affidavit where he states that when the petitioner was produced before the J.M.O., Colombo that she did not disclose a word to him about the alleged torture or degrading treatment inflicted on her.

The 3rd respondent admits that the petitioner was taken over by the Terrorist Investigation Unit on 26.6.2000 for further investigation but denies that the petitioner was assaulted or tortured as alleged by her. The 3rd respondent also admits that he and the Superintendent of Police, Gamini Dissanayake accompanied the petitioner to Vavuniya but denies that he placed several applications of Tamil personnel who had obtained passes to travel to Colombo from Vavuniya and directed the petitioner to pick out the passes of LTTE cadres and when she failed to do so that he mercilessly assaulted the petitioner in the presence of Superintendent of Police, Gamini Dissanayake.

The 2nd respondent, the Headquarter Inspector of the Negombo Police Station in his affidavit states that he was on leave between 21.6.2000 and 26.6.2000 and was away from the station at Dikwella and that one Inspector Rodrigo acted for him as the Headquarter Inspector at the relevant time. The 2nd respondent denies the petitioner's allegations that she was tortured at the Negombo Police Station. Since on his own admission he was away at Dikwella on leave, during the relevant period he was chosen to base his objections relying on the notes of the 9th respondent. Hence no reliance can be placed on the assertions in paragraph 3 to 13 of his affidavit as the assertions therein are based on hearsay material.

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The 9th respondent in his affidavit admits that he along with some other officers attached to the Negombo Police Station arrested the petitioner and searched her house in Trincomalee and brought the petitioner to the Negombo Police Station and detained her there till she was handed over to the officers of the Terrorist Investigation Unit of the Criminal Investigation Department on 26.6.2000. This respondent denies that the petitioner was tortured by him or any other respondents attached to the Negombo Police Station. He further states that although several relatives and the Attorney at Law of the Petitioner visited her that the petitioner did not complain of the alleged torture to them or to the A.J.M.O before whom the petitioner was produced. This respondent has produced the notes relating to the arrest of the petitioner marked 'R1', the Detention Order upon which the petitioner was detained marked 'R2', the Medico Legal Examination form marked "R3' and the statement of the Petitioner and the notes of the police officers marked 'R4'.

On a perusal of the notes of investigation relating to the arrest of the petitioner made by the 9th respondent, it appears that on 20.6.2000 that he had left the Negombo Police Station at 5.45 p.m. with a party of police officers including the 1st respondent and an informant probably (Sekar) referred to by the petitioner, in a private van driven by a police driver. They had arrived at 1 a.m. at the Habarana police station and has spent the night there since it was not safe to proceed to Trincomalee at that time of the night. He had left the Habarana Police Station at 6 a.m and reached the Trincomalee police station at 10 a.m. At the Trincomalee Police Station he had sought the assistance of the Headquarter Inspector of the Trincomalee Police Station and together with some police officers from Trincomalee and proceeded to Linganagar. On learning that the petitioner had left for Trincomalee town he had kept the police officer from Trincomalee at Linganagar and proceeded towards Trincomalee town. Whilst patrolling the Trincomalee town near the People's Bank the private informant had pointed out the petitioner and she had been arrested by the 9th respondent. Thereafter her house in Trincomalee had been searched and she had been brought to the Negombo Police Station at 8.50 p.m. on 21.6.2000.

The notes of investigations of the Police Officers R.S. I. Wijesekera, the 1st respondent, Police Sergeant 2714 Mahinda and that of women Police Constables 1439 Gamlath, 1341 Rupasinghe and 1263 Samanthi, all reveal that they had accompanied the 9th respondent to arrest the petitioner on information that the petitioner was a member of the LTTE Suicide Squad but nowhere in their objections have the respondents claimed that at the time of arrest that the petitioner was informed that she was being arrested for that reason. According to the petitioner, the reason was given only after she was arrested and put inside the van, when one of the Police Officer had informed her that they had come from the Negombo Police Station to arrest her in connection with an information lodged against her by the 8th respondent.

However, it is to be observed that in the 'B' Report dated 21.7.2000 filed by the O.I.C. of the Terrorist Investigation Unit at the time the petitioner was produced before the learned Magistrate it is stated that "the investigations reveal that the petitioner had received training

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in LTTE training camps and that she had failed to divulge that information to the police." It is also observed that in the Detention Order 'R2' issued by the D.I.G. the reason given for the detention of the petitioner for 90 days under Regulation 19 (2) of the Emergency Regulations is that there were reasonable grounds for suspecting the petitioner to be concerned in or to be committing or to have committed offences under Regulation 45 of the Emergency Regulations. Regulation 45 of the Emergency Regulations deals with attempts to commit offences and states that:

1. any person who attempts to commit or does any act preparatory to the commission of; or

2. aids or abets another person to commit and; or

3. conspires with another person in the commission of an offence under any Emergency Regulation shall be guilty of that offence and shall accordingly, be tried in the like manner and be punished with the same punishment as is provided for such offence under the Emergency Regulations.

Thus it is seen that the respondents have given different reasons at different times in regard to the reasons for the arrest of the petitioner. Further although in the affidavits of the respondents the claim that the petitioner was a member of the LTTE Suicide Squad there is not an iota of evidence to support that assertion. On the other hand the record reveals that no proceedings had been instituted against the petitioner in any Court under any law and she has been discharged from custody.

The Detention Order 'R2' upon which the petitioner had been detained specifies the place of detention as the police Station Negombo, and it is to be noted that the petitioner had been taken away to the Terrorist Investigation Unit from 26.6.2000 and detained there, from where she was produced before the Magistrate and remanded.

Although the 9th respondent has produced the Detention Order marked 'P2' issued by the D.I.G. ordering the detention of the petitioner for 90 days at the Negombo Police Station the D.I.G. has chosen not to adduce any material relating to the circumstances under which he formed the opinion that he had reasonable grounds to suspect that the petitioner was concerned in committing offences under Regulation 45 of the Emergency Regulations. Further no explanation has been adduced by the respondents as to why she was detained at the T.I.D. from 26.6.2000 until she was remanded by the Magistrate. In my view the respondents have failed to establish any acceptable or plausible reason upon which the petitioner had been arrested and detained at the Negombo Police Station and the T.I.D. I hold that the detention of the petitioner at the T.I.D from 26.6.2000 was unauthorized and unlawful.

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For the reasons stated I hold that the arrest and detention of the petitioner was unlawful and that the 1st to 5th and the 9th respondents have violated the petitioner's fundamental rights guaranteed under Article 13 (1) and 13 (2) of the Constitution.

Although the respondents in their objections have denied that the petitioner was assaulted and tortured at the Negombo Police Station, as well as in the Terrorist Investigation Unit in the Criminal Investigation Department and tendered the Medico Legal Form 'R3' and the report of Dr. Sivasubramaniam the A.J.M.O., Colombo which state that the petitioner had no injuries. They had been obtained whilst the petitioner was in the custody of the police and no reliance can be placed on them.

An examination of the report of the Assistant Judicial Medical Officer, Teaching Hospital, Colombo North, Ragama 'P2' reveals that the petitioner had been examined on 4.11.2000 as directed by the learned Magistrate. She had given a long history to the Judicial Medical Officer in regard to the acts of torture and assault by the Police Officers of the Negombo Police Station and also at the Terrorist Investigation Unit.

Upon examination, the Doctor had found the following injuries:

SCARS ON THE ANTERIOR ASPECTS OF THE BODY

1. somewhat oval shaped, hypo pigmented, depressed scar, 1/2 x 1/4 in size, placed on the left front of the chest 3 cm above and 3.5 cm medially to the breast.

2. Brown irregular shaped, scar 2 cm x 1.5 cm, in size placed on the right lower abdomen 3 cm below and laterally to the umbilicus.

3. Brown linear thin scar 3 cm long, somewhat horizontally placed in the left lower abdomen. It's medial and was 5 cm below and 3 cm laterally to the umbilicus.

4. Brown somewhat circular shape scar, 2 cm in diameter placed on the front of the upper forearm 3.5 cm below the mid of the cubical fosse.

5. There were two irregular shaped, brownish, somewhat thickened scars in varying sizes (2.5 cm -2 cm x 1.5 cm) placed in front of the left knee.

6. Hypo pigmented, circular, somewhat depressed scar 2 cm in diameter placed in the front left lower leg 5 cm above the ankle.

7. There were two hypo pigmented, rectangular shaped, somewhat depressed scars in varying sizes (2.5 cm-2 cm x 2 cm-1.5 cm) placed in the dorsum of the left foot.

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8. Brown irregular shaped, somewhat depressed scar 2 cm x 1.5 cm in size placed on the front of the right mid thigh 6 1/2 above the knee.

9. An oval shaped, hypo pigmented somewhat depressed scar 1.5 cm x 5 cm in size placed on the front of the right lower thigh 3 cm above the knee.

10. There were two irregular shaped hypo pigmented thickened scars each measuring 1.5 cm x 1 cm and 1 cm x 5 cm in size placed on the front of the right knee.

11. There were about four somewhat circular brown scars 2 cm in diameter placed on the dorsum of the right foot.

SCARS ON THE POSTERIOR ASPECT OF THE BODY

1. A 'Y' shaped 0.5 x 0.5 x 1 cm in size hypo pigmented scar placed on the back of the upper arm 3.5 cm below the shoulder tip.

2. An oval shaped, hypo pigmented scar 1.5 cm x 5 cm in size placed on the lateral aspect of the left elbow.

3. An oval shaped, somewhat depressed black scar, 2 cm x 1 cm in size placed on the back of the right upper forearm 4.5 cm below the elbow.

4. An irregular linear hypo pigmented scar, with the weave margin 4.5 cm long placed obliquely towards the mid line just medially to the medial border of the right scapula.

VULVO VAGINAL EXAMINATION

1. Sexual organs and para sexual organs were developed well.

2. Little whitish discharge was present in vulva.

3. Labia covered with vaginal orifice and there was no scars or injury on the labia.

4. Clinically there was no signs of venereal diseases.

5. There were two old tears on the 6' clock and 3' clock positions on the annular deeply seated hymen with multiple folds.

6. Introits (vaginal Orifice) admitted the index finger with moderate resistance and painful discomfort.

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7. Pain on the lower abdomen (suprapubically) noted while performing the bimanual vaginal examination

SYSTEMATIC EXAMINATION

1. respiratory and central nervous systems were clinically normal

2. The lower abdominal pains (Tenderness) notes on the palpation of abdomen.

According to the report of the Assistant Judicial Medical Officer 'P2' the petitioner had been examined by the Consultant Psychistrist Dr. P.N. L. Fernando who had reported that she has suggestive features (symptoms) of post traumatic disorder with depressive features.

Upon examination by the Consultant Obstetrician and Gynecologist Dr. Agitha Wijesundara he had reported that there were two old tears at the 3 o' clock and 6 o' clock positions on the hymen with admission of the index finger.

The Consultant Radiologist Dr. Mrs. K.G. Krishanthi Pathirana had performed an ultra sound examination on the pelvis and reported as follows: Bulky uterus with thickened endometrium and cystic left adnexal mass with moderate amount of fluid in the pouch of douglas. The cause of the thickened endometrium and pelvic sepsis may be on account of insertion of the plantain flower being introduced.

By way of conclusion the A.J.M.O has found that:

b. There is positive medical evidence of vaginal penetration.
c. There is positive evidence of pelvic sepsis with endometriosis;
d. She has many scars on her limbs and the torso: and
e. She has features of posttraumatic disorder and depression. The considered medical opinion of the A.J.M.O. is that;

a. vaginal penetration by the insertion of plantain flower is possible.

b. Pelvic sepsis with endometriosis could have followed by the insertion of plantain flower as conclusively suggested by the Consultant Radiologist. The frequency of urination and irregular menstrual period could have been the result of the physical, psychological and sexual violence, that she underwent whilst in custody.

c. The symptoms of post traumatic disorder and depression could have resulted from physical and mental trauma, that she underwent whilst in custody.

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d. The causation of the original injuries and resultant scars could have been sustained in the manner described in the history given by the prisoner.

The medical opinion, in my view, amply corroborates the petitioner's version in regard to the injuries caused and their causation. As Athukorala J in ***Sudath Silva*** v. ***Kodituwakku 1987 2 Sri L.R, 119*** observed 'the facts of this case has revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in police custody. Such methods can only be described as barbaric, savage and inhuman. They are most revolting and offend one's sense of human decency and dignity particularly at the present time when every endeavor is being made to promote and protect human rights.'

For the reasons stated I hold that the 1st to 5th and 9th respondents have violated the petitioner's fundamental rights guaranteed under Article 11 of the Constitution as well.

I order that Rs. 250,000/- be paid as compensation and costs to the petitioner out of which Rs. 150,000/- be paid personally by the 1st 3rd & 9th respondents in equal shares and the balance Rs. 100,000/-by the State.

I further direct the Attorney General to consider taking steps under the Convention Against Torture and other cruel, Inhuman or degrading treatment Or Punishment Act No. 22 of 1994 against the Respondents and any others who are responsible for the acts of torture perpetrated on the Petitioner.

JUDGE OF THE SUPREME COURT

FERNANDO, J.

I agree

Sgd.

JUDGE OF THE SUPREME COURT

ISMAIL, J.

I agree

Sgd.

JUDGE OF THE SUPREME COURT

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